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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 14 2004

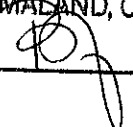
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOHN K. ADAMS,

Defendant.

DAVID J. MALAND, CLERK
BY DEPUTY 

COMPLAINT

4:04CV322

Plaintiff, the United States Securities and Exchange Commission, files this Complaint against John K. Adams ("Adams" or "Defendant") and would respectfully show the Court as follows:

SUMMARY

1. This case concerns Defendant's involvement in the improper recognition of income by Fleming Companies, Inc. ("Fleming").
2. Starting in late 2001, Fleming implemented a plan to improperly recognize material amounts of income to compensate for forecasted earnings shortfalls. Adams, an employee of Kraft Foods, Inc. ("Kraft"), a Fleming vendor, provided two side letters, as well as an audit confirmation letter, to Fleming that improperly described \$7.25 million in payments to Fleming.
3. Based on the conduct alleged herein, Adams aided and abetted Fleming's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)] and Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)(A)], and Rules 12b-20, 13a-1, 13a-13, and 13b2-1, thereunder, [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13, and 240.13b2-1].

JURISDICTION AND VENUE

4. The Commission brings this action pursuant to the authority conferred upon it by Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Sections 21(d)(3) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(3) and 78aa].

5. This Court has jurisdiction over this action, and venue is proper, pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d) and 77v(a)], and Sections 21(d)(3) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d) and 78aa].

6. Defendant, directly or indirectly, made use of the means and instrumentalities of interstate commerce, or of the mails, or of the facilities of a national exchange in connection with the acts, practices, and courses of action alleged herein.

7. Venue is proper because Fleming is headquartered in Lewisville, Texas, and certain of the acts and transactions described herein took place in the Eastern District of Texas.

DEFENDANTS

8. **Adams**, of Dallas, Texas, was a Region Manager at Kraft during the relevant periods. Fleming was one of Kraft's largest customers, and Adams had responsibility for the Fleming account.

OTHER RELEVANT ENTITY

9. **Fleming**, is an Oklahoma corporation headquartered in Lewisville, Texas. Fleming's stock is registered pursuant to Section 12 of the Exchange Act and, prior to filing for Chapter 11 bankruptcy protection in April 2003, its stock traded on the New York Stock Exchange. Before bankruptcy, Fleming was the nation's largest grocery wholesaler and a retail grocery operator with approximately 50 distribution centers nationwide and more

than 100 retail stores throughout the Midwestern and Western United States. In 2001, Fleming reported approximately \$15.6 billion in revenues and \$23.3 million in profits. In 2002, the company reported \$15.5 billion in revenues and a net loss of \$84 million.

FACTS

Fleming's improper initiatives to meet earnings expectations

10. During 2001 and the first half of 2002, and following a period of poor financial performance, Fleming improperly executed a series of transactions, called "initiatives," to fabricate earnings and "bridge the gap" between actual operating results and Wall Street expectations. In these initiatives, Fleming improperly structured otherwise ordinary transactions in forms that, on paper, would justify and maximize an immediate increase in earnings.

11. One of Fleming's frequently used initiatives was accelerating recognition of up-front payments received under forward-looking vendor agreements. Specifically, Fleming persuaded vendors to provide side letters that described up-front payments—that Fleming and the vendors plainly intended to secure future rights and services—as compensating some form of past performance, such as rebates or expenses. Fleming then used these letters to immediately book the entire up-front payment as an offset to expenses, rather than over time as generally accepted accounting principles ("GAAP") required.

12. As designed, the illicit reduction in expenses by Fleming significantly inflated the company's earnings in the fourth quarter of 2001 and the first two quarters of 2002 and allowed Fleming to meet securities analysts' earnings expectations.

Adams' participation in Fleming's inflated earnings

The 2001 agreements between Kraft and Fleming

13. During 2001, Fleming and Kraft executed two pertinent agreements. In April 2001, the parties entered into a one-year "no-divert" agreement, under which Kraft was to pay \$7.5 million to Fleming in exchange for Fleming's promise to waive certain promotional fees and to refrain from "diverting" Kraft products. "Diverting," disfavored by manufacturers, occurs when a wholesaler overbuys from a vendor at a special discount, and then sells the excess product to buyers other than its normal customers at a higher price.

14. In June 2001, the parties agreed to a one-year preferred vendor agreement (the "Kraft PVA"). Under the agreement, Kraft was to pay Fleming \$10.7 million in exchange for Fleming's commitment to eliminate several dysfunctional practices and fees and to cooperate in the resolution of certain disputed deductions made by Fleming. Although these deductions generally declined following this agreement, they nevertheless continued, and by early 2002, amounted to at least \$4 million.

The December 2001 side letter

15. As the 2001 fiscal year was ending, Fleming sought ways to meet an impending earnings shortfall. In December 2001, Fleming contacted Adams and requested that Kraft accelerate \$1.65 million payable under the no-divert agreement. Although these funds were not due until the first quarter of 2002 under the terms of the no-divert agreement and were subject to other performance criteria, Kraft agreed to make the requested payment in December 2001.

16. Simultaneous with the \$1.65 million payment, Adams also signed a Fleming-prepared letter which represented that Kraft was willing to pay Fleming \$1.65 million to "offset the administrative costs associated with" the no-divert agreement. Neither the no-divert agreement nor Fleming's records, however, indicated that any "administrative costs" were owed. Instead, Fleming desired the letter solely to justify recording the entire \$1.65 million in the fourth quarter of 2001, which overstated Fleming's earnings for the quarter by approximately 12%.

17. Fleming included these misstated earnings in its 2001 Form 10-K, and in publicly disseminated press releases.

18. In February 2002, Adams also signed and returned an audit confirmation letter stating that Fleming was entitled to \$1.65 million to offset the administrative costs incurred in the period April 2001 to December 2001.

The April 2002 side letter

19. In early 2002, Kraft and Fleming began negotiations to extend the no-divert agreement, set to expire in April 2002. In mid-April 2002, just before Fleming's fiscal first quarter ended, Kraft agreed to pay \$5.6 million to extend the no-divert agreement to December 31, 2002.

20. Fleming, however, needed to recognize the \$5.6 million payment immediately to help meet analysts' first quarter earnings targets. Fleming asked Adams to sign a Fleming-dictated letter describing the \$5.6 million as payment of a purported "shortfall" under the Kraft PVA. Although no shortfall existed, Adams signed the letter.

21. Fleming then used the letter to justify booking the entire \$5.6 million in the first quarter of 2002, which provided approximately \$.06 of the company's reported \$.52

per share quarterly earnings. Fleming included these figures in its Form 10-Q for the first fiscal quarter ended April 20, 2002, and in publicly disseminated press releases. Fleming further incorporated the first quarter Form 10-Q into registration statements on Forms S-3, S-8 and S-4 filed during the summer of 2002.

22. Fleming's recognition of the entire \$5.6 million in its first quarter 2002 financial statements violated GAAP. The payment was express consideration for extending the no-divert agreement, and Kraft would not have made the payment but for that extension. Thus, Fleming was required under GAAP to recognize the payment ratably over the extension's term.

FIRST CLAIM

Aiding and Abetting Fleming's Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act

23. Paragraphs 1 through 22 are realleged and incorporated by reference.

24. Based on the conduct alleged herein, Fleming violated Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

25. Defendant Adams, acting alone or in concert with others, in the manner set forth above, provided substantial assistance to Fleming in connection with its violations of Sections 17(a)(2) and 17(a)(3) as alleged herein.

26. By reason of the foregoing, Adams aided and abetted Fleming's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

SECOND CLAIM

Aiding and Abetting Fleming's Violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13 and 13b2-1 Thereunder

27. Paragraphs 1 through 22 are realleged and incorporated by reference.

28. Based on the conduct alleged herein, Fleming violated Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)(A)] and Rules 12b-20, 13a-1 and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13 and 240.13b2-1].

~~29. Defendant Adams, acting alone or in concert with others, in the manner set~~
forth above, aided and abetted Fleming, as an issuer of a security registered pursuant to Section 12 of the Exchange Act, in its failing to file with the Commission, in accordance with rules and regulations the Commission has prescribed, information and documents required by the Commission to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12 of the Exchange Act and annual reports and quarterly reports as the Commission has prescribed.

30. Defendant Adams, acting alone or in concert with others, in the manner set forth above, provided substantial assistance to Fleming, who, directly or indirectly, failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected Fleming's transactions and dispositions of its assets.

31. By reason of the foregoing, Adams aided and abetted Fleming's violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)(A)] and Rules 12b-20, 13a-1, 13a-13, and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13, and 240.13b2-1].

PRAYER FOR RELIEF

The Commission respectfully requests that the Court:

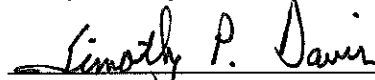
I.

Enter an order directing Adams to pay a \$25,000 civil money penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)].

II.

Grant such further relief as the Court deems just and proper.

Respectfully submitted,



TIMOTHY P. DAVIS

(Attorney in charge)

Texas Bar No. 00798134

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Securities and Exchange Commission
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Texas Bar No. 00784738
JAMES E. ETRI
Texas Bar No. 24002061

ORIGINAL**CIVIL COVER SHEET**

4:04 CV 322

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I.(a) PLAINTIFF**SECURITIES AND EXCHANGE COMMISSION**

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEY (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Timothy P. Davis, Esq.
SECURITIES & EXCHANGE COMMISSION
Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, TX 76102-6882
817/978-6438

DEFENDANT**JOHN K. ADAMS**

County of Residence of First Listed Defendant: **DALLAS, TX**
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

ATTORNEYS (IF KNOWN)

See attached listing

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

- | | PTF | PTF | | PTF | PTF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery OF Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 156 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copy rights <input type="checkbox"/> 830 Patient <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395FF) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input checked="" type="checkbox"/> 850 Securities Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights		

V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (Specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judge

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.) Sections 17(a)(2) & (3) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77q(a)(2) & (3)]; Sections 13(a) & 13(b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(m)(a) & (b)(2)(A)]; and Rules 12b-20, 13a-1, 13a-13 and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13 and 240.13b2-1].

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION

DEMAND \$

CHECK YES only if demanded in complaint:

COMPLAINT:

☐ UNDER F.R.C.P. 23JURY DEMAND ☐ YES☒ NO**VIII. RELATED CASE(S) (See Instructions): 4 other related cases simultaneously filed: see attached listing.**

IF ANY

JUDGE

DOCKET NUMBER

DATE 09/14/2004 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

Receipt # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

I.(c.) - COUNSEL FOR DEFENDANTS

**C. W. Flynn, IV, Esq.
Bradley W. Foster, Esq.
LOCKE LIDDELL & SAPP, LLP
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Suite 2200
Dallas, TX 75201-6776
214/740-8664
Counsel for Defendant John K. Adams**

VIII. – RELATED CASES:

**SEC v. Bruce Keith Jensen
SEC v. Kemps LLC, f/k/a Marigold Foods LLC, James Green and Christopher Thorpe
SEC v. Digital Exchange Systems, Inc., Rosario Coniglio & Steven Schmidt
SEC v. Dean Foods Company and John D. Robinson**
